

NO. 48315-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

KEVIN COX,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00209-0

BRIEF OF APPELLANT

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I. INTRODUCTION

On May 25, 2015, Officer Donald Ponton, Forks Police Dept., applied for and obtained a search warrant to search Mr. Cox's vehicle for a firearm. CP 23. During the course of the search of the vehicle, Officer Ponton found a firearm and determined that Mr. Cox had a prior felony conviction. CP 25–26. On May 29, 2015, the State filed an information charging Mr. Cox with the crime of Unlawful Possession of a Firearm in the Second Degree. CP 67. Mr. Cox challenged the search warrant on the basis that the warrant was issued based on material misrepresentations and/or omissions and/or statements made with reckless disregard for the truth. CP 28.

A *Franks*¹ suppression hearing was held (RP 1–56 (10/28/2015)) and the Clallam County Superior Court found that the warrant was based upon representations which were made in reckless disregard for the truth and that the remainder of the affidavit, absent the offending misrepresentation, did not establish probable cause for the search warrant. CP 5–6.

The State appeals the findings of fact and conclusions of law on the basis that the findings of fact are not supported by substantial evidence.

II. ASSIGNMENTS OF ERROR

1. The State assigns error to the following conclusion of the trial court:

¹ *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

That Officer Ponton, “maintained that Mr. Cox admitted that he had a firearm in the vehicle when those statements are clearly untrue and were made in reckless disregard for the truth and were not the actual statements and underlining circumstances that would be needed to support probable cause.”

CP 14.

2. The trial court erred by concluding that Off. Ponton stated at least on two occasions within the brief taped statement to the magistrate that Mr. Cox said he had a gun in the car and that, based upon Officer Ponton’s own testimony, these statements were not true. (CP 12–13).

Off. Ponton made it clear in his affidavit that Mr. Cox said there was possibly a firearm in his vehicle and Off. Ponton’s testimony was consistent with his affidavit.

3. The trial court erred by concluding that: “Officer Ponton admitted that his conclusions that Cox ‘said he had a gun in his car’ were false.” CP 13.

Off. Ponton stated in the affidavit and testified in Court that Mr. Cox told him there was possibly a firearm in the vehicle and that it would be under the front seat if it was there. Off. Ponton never admitted that this statement was false.

RP 26, 30, 35–36.

4. The State assigns error to the following conclusion of the trial court:

That Officer Ponton, “maintained that Mr. Cox admitted that he had a firearm in the vehicle when those statements are clearly untrue and were made in reckless disregard for the truth and were not the actual statements and underlining circumstances that would be needed to support probable cause.”

CP 14.

5. The trial court erred in finding of fact no. 8, by finding that, in the affidavit to the magistrate, Officer Ponton specifically stated that “[Mr. Cox] said he might have a 9mm in his car” because Officer Ponton assumed anyone who still had magazines would still have a weapon. (CP 11).

Off. Ponton told the magistrate that “that later on [Mr. Cox] said he might have a 9mm in his car” because of what Mr. Cox said about the 9mm magazines and because Mr. Cox stated if he had the firearm, it would be under the front seat.

RP 24–26, 30.

6. The trial court erred in finding of fact no. 9, by finding that “[w]hen the magistrate (Judge Wood) questioned the Officer during the

telephonic affidavit whether Cox admitted he had a firearm in his vehicle, Officer Ponton said yes.” (CP 11).

Judge Wood asked Off. Ponton, if Mr. Cox admitted that he has a possible firearm in his vehicle. Off. Ponton replied, “Yeah, he said it would be under the front seat, the front driver’s seat, if he did have it.”

RP 36 (10/28/15).

7. The trial court erred in finding of fact no. 11, by finding that the magistrate found probable cause for a search of Mr. Cox’s vehicle based on Officer Ponton’s assertions to the magistrate that Cox said he had a gun in his car and the statement that “we had information that he had a gun possibly in his possession or at this apartment.” (CP 11.)

Judge Wood did not find probable cause until it was clarified that Mr. Cox admitted that he has a possible gun in the vehicle.

RP 36.

8. The State assigns error to the trial court’s reliance upon *State v. Stephens*, 37 Wn. App. 76, 676 P.2d 832 (1984), for its conclusion that the offending statement by Officer Ponton was a misstatement made with reckless disregard of the facts. *See* CP 13.

9. The trial court erred by concluding that absent Off. Ponton's alleged false statement, there was no probable cause for the search warrant.
10. The trial court erred by entering an order suppressing the fruits of the search of the defendant's vehicle.

III. STATEMENT OF THE ISSUES

1. Whether there is sufficient evidence to support the finding that Officer Ponton told the magistrate on at least two occasions, when applying for a search warrant, that Mr. Cox admitted to him that there were guns in the vehicle (CP 13) when Officer Ponton qualified his statement three times; first, by saying "[Mr. Cox] said he *might* have a 9 millimeter in his car" (RP 36); second, by affirming to the magistrate that Mr. Cox admitted he's got a *possible* firearm in his vehicle; and third, by clarifying that Mr. Cox said the firearm would be under the front seat if he did have it (RP 36)? (Assignments of error 5, 6).

2. Whether there is sufficient evidence to support the trial court's conclusion (CP 13-14) that Officer Ponton, on at least two occasions in the affidavit, maintained that Mr. Cox admitted that he had a firearm in the vehicle when those statements were clearly untrue and were made in reckless disregard for the truth; although, Officer Ponton affirmed to the issuing magistrate in the affidavit and testified before the trial court that Mr. Cox said he *might* have a firearm under the front seat of his vehicle (*see* RP

30, 25, 26, 36, 37, 38, 40) and there was no evidence presented that this was a false statement? (assignment of error 1, 2, 3, 4).

3. Whether there was sufficient evidence to support the trial court's conclusion that the issuing magistrate based the finding of probable cause on the alleged false statement that Mr. Cox told Off. Ponton that there was a firearm in his vehicle, when the Off. Ponton affirmed and clarified to the magistrate that Mr. Cox stated there was *possibly* a firearm in the vehicle. (assignment of error 7).

4. Whether the court's suppression order based upon the erroneous findings of fact and conclusions of law was an abuse of discretion? (assignment of error 9, 10).

IV. STATEMENT OF THE CASE

A. BACKGROUND FACTS

Officer Ponton's Statement of Probable Cause (CP 24–26)

On May 25, 2015, Officer Donald Ponton, Forks Police Dept., was dispatched to a threatened suicide where, Kevin Cox, the defendant, was leaving the hospital and headed home to 250 Fir. Ave. Apt K., in Forks, WA. CP 24, 35. Off. Ponton was informed that Mr. Cox might have a gun and wanted to die. CP 35. Off. Ponton and Clallam County Sheriff's Deputy, Joe Pursley, located Mr. Cox walking down the road (RP10, CP 35) and ended up detaining Mr. Cox until medics arrived and took him to the hospital by

ambulance. CP 25, 35; RP 10–11. Off. Ponton later contacted Mr. Cox at the hospital where he completed an Involuntary Mental Health Evaluation form. CP 25, 35; RP 12.

At the hospital, Off. Ponton talked to Mr. Cox and asked if he had any guns in his car. CP 25, 35. Mr. Cox replied that he had an air rifle and air pistol. *Id.*; RP 11–12. Off. Ponton asked Mr. Cox if he had any regular firearms. CP 25. Mr. Cox replied that he had sold them all. CP 25, 35, RP 12. Off. Ponton then told Mr. Cox that he was concerned for his safety and asked if he could recover them from his car. CP 25, 35. Mr. Cox said yes, but wanted to go with Off. Ponton. CP 25, 35. In talking further, Off. Ponton told Mr. Cox that he would be getting a warrant for the car and asked if anything else would be in there. CP 25, 35. Mr. Cox said, no, but that there might be two 9 mm magazines in there. CP 25, 36. Off. Ponton asked if he still had the guns for those and Mr. Cox said he wasn't sure, but that they might be under the front seat. CP 25, 36; RP 13, 22–23, 25–26, 30, 36.

At that point, Mr. Cox asked if he was going to be in trouble for possessing the guns. CP 25, 36. Off. Ponton told him no, that he simply wanted to put them in safe keeping at the police department while he was being evaluated. CP 25, 36. Then Mr. Cox told Off. Ponton that he was a felon. CP 25, 36. Off. Ponton then told Mr. Cox that he would refer the case to the prosecutor's office. CP 25, 36.

Off. Ponton then applied for and obtained a search warrant to search Mr. Cox's vehicle for a firearm. CP 25, 36. Off. Ponton found a 9 mm firearm in a black metal lockbox in the vehicle and confirmed Mr. Cox had a prior felony conviction. CP 25–26, 36.

The affidavit for the search warrant

During the *Franks* hearing and at defense counsel's request (RP 33 (10/28/2015)), the recorded telephonic affidavit for the search warrant for Mr. Cox's vehicle was played for the record and was transcribed at RP 34–37 (10/28/2015). Off. Ponton specifically stated in the affidavit as follows:

We got him over to the hospital and after talking with him over at the hospital for awhile, he said he has a gun in his car. He's got two air guns; an air rifle and an air pistol, but then later on he said he might have a 9 millimeter in his car as well. He is a convicted felon, so he's unable to have those in his possession, so I'm trying to get into his car.

RP 35–36.

Judge Wood inquired further whether Mr. Cox admitted he's got a *possible* firearm in his vehicle and Off. Ponton affirmed that this was correct:

JUDGE: Okay and he's admitted he's got a *possible* firearm in his vehicle then, huh?

OFFICER: Yeah, he said it would be under the front seat, the front driver's seat, if he did have it. He said there are magazines in the trunk and then in the trunk there would be a gun.

RP 36 (10/28/15).

B. PROCEDURAL HISTORY

On May 29, 2015, Mr. Kevin Cox, the Defendant, was charged by

information filed in Clallam County Superior Court with Unlawful Possession of a Firearm in the Second Degree. CP 67. Mr. Cox challenged the search warrant on the basis that the warrant was issued based on material misrepresentations and/or omissions and/or statements made with reckless disregard for the truth. CP 28.

On Oct. 28, 2015, a *Franks* suppression hearing was held (RP 1-56 (10/28/2015)) and the Clallam County Superior Court found that the warrant was based upon representations which were made in reckless disregard for the truth and that the remainder of the affidavit, absent the offending misrepresentation, did not establish probable cause for the search warrant. CP 5-6.

**C. OFFICER PONTON'S TESTIMONY AT
FRANKS HEARING**

Defense counsel examined Off. Ponton regarding the basis for requesting a warrant to search Mr. Cox's vehicle. Off. Ponton testified as follows:

After we got him back to the hospital, I questioned him a little bit, concern for his welfare that he had a gun. He did state that he did have two air guns, I believe is what it was, and that I'd asked him if he has any other guns, any regular guns. He said -- I believe he said that he thinks he might have sold them. Without look[ing] at the report, I can't -- I think he said . . .

Q And if you need to refresh your memory, if have that, you are welcome to look at it and then look at me when you think your memory has been refreshed.

A Okay. . . . I questioned him about the gun, as[ked] him if he had any. He said he had the air rifles. He said that he thinks he might have sold the other regular gun. After questioning him a little bit further, he says he might have some 9 millimeter magazines and that if he did have the guns, it would be under the front seat. Referring, in my line of thinking, I'm thinking 9 millimeter magazines don't fit in air rifles, so when said the guns would be under the front seat, I assumed that there were 9 millimeter pistols under the front seat and then that's -- basically, that's what I based my probable cause for the search warrant off of.

Q Okay in your remembrance, is that your basis for the probable cause is that what you believed you said to the judge in your asking for the search warrant?

A Yeah, I told the judge that we had prior information that he had a gun and that he was gonna hurt himself, he's gonna kill himself and that he did tell me that he had a gun in his car and that it would be under the front seat or possibly had a gun in his car, it'd be under the front seat.

RP 11-13 (10/28/2015).

Defense counsel also questioned Off. Ponton specifically about his discussion with Mr. Cox:

Q Okay, so you asked Mr. Cox if he had any guns in his car or words to that effect.

A Right.

Q And his response was that he had an air rifle, an air pistol or words to that effect?

A Right.

Q And then you then asked Mr. Cox if had any regular firearms? This is all -- or words to that affect? I just don't want to keep repeating things.

A Right, right, yes, I did.

Q Okay and then he indicated to you, no, he sold them all?

A Yes.

Q And, you told him you were concerned for his safety and asked if you could recover them from his car?

A Yes.

Q And would, "them," be referring to the air rifle and air pistol?

A Yeah.

Q Okay and Mr. Cox said yes, but he wanted to go with you?

A Yes.

Q Okay. You advised Mr. Cox, you'd be getting a warrant for his car and asked if anything else would be in there?

A Right.

Q So, is that language you used, you said, I will be getting a warrant for your car?

A I think it is. What I told him is that we'd be getting a search warrant. Not just -- because, he wouldn't necessarily be able to go with us and so before I would search the car, he wouldn't be able to stand there and say no, I don't want you to search any more.

Q Okay, did you explain to him Ferrier Warnings?

A No, I didn't. That's why I told him, I'd be getting a search warrant, just because he wouldn't be able to go with us.

Q Okay and then you asked him if anything else would be in the car?

A Right.

Q He said no, but there might be two 9 millimeter magazines in the car?

A Yes.

Q Okay and you asked if he still had the guns for those?

A Yes.

Q And he replied that he wasn't sure, but they might be under the front seat?

A Yeah.

Q Okay and at that point you went into a discussion about whether he'd be in trouble for possessing guns?

A Yes.

Q And you told him that you didn't think he'd be in trouble, you just wanted to put them in safe keeping at the police department while he was being evaluated?

A Right.

Q And then he advised you he was a felon?

A Yeah and at that point I was...

Q And, then you said you'd be referring the case to the prosecutor's office?

A Right, right.

RP 21-23 (10/28/15).

Defense counsel sought further clarification regarding what Off.

Ponton told the magistrate when applying for the search warrant:

[Q] Okay, so let's see. Did you advise Judge Wood at any time during your search warrant application that Mr. Cox indicated to you he had sold all of his actual firearms?

A I didn't.

Q Okay. And, is it accurate that you advised Judge Wood that Mr. Cox said he had a gun in his car, two air guns; an air rifle and an air pistol?

A Yes.

Q Okay and you additionally advised Judge Wood during the warrant application, that later on Mr. Cox said he might have a 9 millimeter in his car?

A Yes.

Q Okay and then shortly after that, the judge asked, "So, he admitted that he (referring to Mr. Cox), has a possible firearm in his vehicle then?"

A Yeah, he said that, "possible firearm," yes.

Q Okay and your response to that was, "Yes," and then you clarified and said, "He said it would be under the front seat, the front driver seat, if he did have it. It said there are magazines in the trunk and in the front seat, so that would be it."

A Yes.

Q Okay, so did you ever clarify to Judge Wood that Mr. Cox did not actually say he had a gun in his car, he said he might have guns in his car?

A I think that's what -- wasn't that just what that said? I thought that that's what that said, is that he said there were possible guns under the seat.

Q Okay.

A I thought I was clear about that.

Q So, now, you testified earlier that you assumed there was a 9 millimeter pistol under the front seat because of what Mr. Cox said about the magazines?

A Yes, I assumed it would be a 9 millimeter.

Q Okay, so when you said that he has a gun in his car and also the air pistol and the air rifle, that statement was based on your assumption that he had a gun because he told you he had the 9 millimeter magazines?

A Yes, as well as, that he said that if he had them, the gun, referring to the guns, if he had the guns it would be under the front seat.

RP 24-26 (10/28/15).

Then the Court continued questioning for clarification:

THE COURT: Okay and when you used the phrase and I'm gonna read directly from the affidavit.

"We got him over to the hospital and after talking to him at the hospital for a while, he said that he has a gun in his car, two air guns; an air rifle and pistol, and then later on said he might have a 9 millimeter in his car. As well, he's a convicted felon, so he shouldn't have. He's unable to have those in his possession."

So, when you said the phrase, "He said that he has a gun in his car," and then you describe two air guns; air rifle and air pistol. I guess I'm asking you, why you use the phrase, "that he said he has a gun in his car?"

THE WITNESS: *Because he said that he may have the guns under his front seat and so -- the pistol under his front seat and so I said it that way. I didn't -- it wasn't a -- I don't know why other than that, that he said he had it under his front seat or that he may have it under his front seat.*

THE COURT: Uh hum.

THE WITNESS: I thought I later clarified that.

THE COURT: Yeah and I'm gonna go on with that, because later then even Judge Wood, who responded to you and asked a question in the affidavit. He said, quote, "*So, he admitted that he has a possible firearm in his vehicle then, huh?*", unquote. And then you made a response, "*He said it would be under the front seat, front driver seat, if he did have it.*"

Okay, so that's a correct representation of Judge Wood's question to you and then you said, "*If he did have it.*"

THE WITNESS: *Right.*

THE COURT: Okay.

RP 30-31 (10/28/15).

D. THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT

The trial court ultimately found that Officer Ponton recited to the magistrate on at least two occasions in his statement that Mr. Cox admitted that he has a gun in his car and that no actual statement was made by Mr. Cox. CP 13. The trial court found that "Officer Ponton admitted that his

conclusion that Cox “said he had a gun in his car” [was] false.” CP 13. “The magistrate issued the search warrant based on at least two times in the affidavit where the officer maintained that Mr. Cox admitted that he had a firearm in the vehicle when these statements are clearly untrue and were made in reckless disregard of the truth and were not the actual statements and underlining circumstances that would be needed to support probable cause.” CP 13–14.

V. ARGUMENT

The State challenges the trial court’s finding that Officer Ponton stated in the affidavit for the warrant, in unqualified terms, that Mr. Cox admitted there was a firearm in the vehicle. The State challenges the conclusion Off. Ponton’s made such a statement and that Off. Ponton’s actual statement was an untrue statement made with reckless disregard for the truth. Finally, the State challenges the conclusion that the magistrate relied upon the alleged false representation to find probable cause for the search warrant.

The trial court's findings of fact are reviewed under a clearly erroneous standard, and will be reversed only if not supported by substantial evidence. *State v. Grewe*, 117 Wash.2d 211, 218, 813 P.2d 1238 (1991). Substantial evidence exists only if there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994) (citing *State v. Halstien*, 122 Wash.2d 109, 129, 857 P.2d 270 (1993)). Great deference is given to the trial court's factual findings. *State v. Cord*, 103 Wash.2d 361, 367, 693 P.2d 81 (1985).

State v. Atchley, 142 Wn. App. 147, 154, 173 P.3d 323 (2007); *see also State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

A. OFF. PONTON NEVER CONVEYED IN THE AFFIDAVIT THAT MR. COX ADMITTED THERE WAS A FIREARM IN THE VEHICLE BECAUSE OFF. PONTON MADE IT CLEAR THAT MR. COX ADMITTED THERE WAS *POSSIBLY* A FIREARM IN THE VEHICLE.

The trial court found that “the single most pervasive fact in the affidavit that the Officer recited to the magistrate was that on at least two occasions in his statement he claimed that Mr. Cox admitted that he has a gun in his car. No actual statement was made by Mr. Cox to allow the Officer to make that rather specific conclusion . . .” CP 13. The record does not support this conclusion.

Off. Ponton specifically stated in the affidavit as follows:

We got [Mr. Cox] over to the hospital and after talking with him over at the hospital for awhile, he said he has a gun in his car. He’s got two air guns; an air rifle and an air pistol, but then later on *he said he might* have a 9 millimeter in his car as well. He is a convicted felon, so he’s unable to have those in his possession, so I’m trying to get into his car.

RP 35–36 (10/28/15).

Judge Wood inquired further whether Mr. Cox admitted he’s got a *possible* firearm in his vehicle and Off. Ponton affirmed that this was correct:

JUDGE: Okay and he’s admitted he’s got a *possible* firearm in his vehicle then, huh?

OFFICER: *Yeah*, he said it would be under the front seat, the front driver's seat, *if he did have it*. He said there are magazines in the trunk and then in the trunk there would be a gun.

RP 36 (10/28/15).

From this, the trial court found that Off. Ponton stated at least on two occasions within the brief taped statement to the magistrate that Mr. Cox admitted he had a gun in the car. CP 12–14.

Off. Ponton testified at the *Franks* hearing that he clarified in the affidavit to the magistrate making clear that Mr. Cox did not actually say he had a gun in his car, but that he said he *might* have a gun in his car under the front seat. RP 25–26, 30–31.

From this, the trial court found that “Officer Ponton admitted that his conclusions that Cox ‘said he had a gun in his car’ were false.” CP 13.

These findings are erroneous because Off. Ponton clarified in the affidavit that there was *possibly* a gun in the vehicle. However, the trial court ignored the “*possibly*” and misconstrued what Off. Ponton actually stated in the affidavit. The court changed Off. Ponton’s statement regarding Mr. Cox’s admission from a possibility to an affirmative unqualified statement: Mr. Cox admitted there was a gun in the vehicle. CP 11 (finding of fact no. 9). Finally the trial court concluded that Off. Ponton made the misconstrued statement in reckless disregard for the truth.

These findings are not supported by the evidence because the affidavit

itself shows that Off. Ponton *did not* convey to the issuing magistrate that Mr. Cox admitted he had a gun in his vehicle in *unqualified terms*. In order to come to such a conclusion, one would have to isolate one clause, “he said he has a gun in his car” and ignore the qualification of “possibly” thereby taking the offending clause out of context. Only then could one reasonably conclude that Off. Ponton told the issuing magistrate that Mr. Cox admitted he had a firearm in his vehicle without qualification.

The Court disregarded the critical word “possibly” in Off. Ponton’s statements. Because of this, every conclusion that follows is incorrect and incomplete.

The trial court also erred by misconstruing Off. Ponton’s testimony in other ways in coming to the conclusion that Off. Ponton made a positive representation to the magistrate that Mr. Cox stated he had a firearm in the vehicle.

First, the trial court found in finding of fact no. 8, that Officer Ponton specifically stated “that later on [Mr. Cox] said he might have a 9mm in his car” “*because [Off. Ponton] assumed anyone who still had magazines would still have a weapon.*” (CP 11).

This is incorrect because Off. Ponton told the magistrate “that later on [Mr. Cox] said he might have a 9mm in his car” because of what Mr. Cox said about the 9mm magazines and *because Mr. Cox stated if he had the*

firearm, it would be under the front seat. RP 24-26, 30. Off. Ponton assumed the firearm would be a 9mm because Mr. Cox mentioned the 9mm magazines were possibly in the vehicle. RP 12, 26.

Second, the trial court erred in finding of fact no. 9, by finding that “[w]hen the magistrate (Judge Wood) questioned the Officer during the telephonic affidavit whether Cox admitted he had a firearm in his vehicle, Officer Ponton said yes.” (CP 11).

This is incorrect because Judge Wood asked Off. Ponton, if Mr. Cox admitted that he has a *possible* firearm in his vehicle. Off. Ponton replied, “Yeah, he said it would be under the front seat, the front driver’s seat, if he did have it.” RP 36 (10/28/15).

The trial court’s finding that Off. Ponton told the magistrate that Mr. Cox admitted there was gun in his vehicle, rather than *possibly* in the vehicle, is not supported by what was actually stated in the affidavit or in testimony and reports. These findings are not supported by substantial evidence.

B. THE COURT ERRED BY CONCLUDING THAT THE OFFICER, WITH RECKLESS DISREGARD FOR THE TRUTH, TOLD THE MAGISTRATE THAT MR. COX ADMITTED THERE WAS A FIREARM IN THE VEHICLE.

“[T]his court reviews challenges to the trial court's conclusions of law de novo.” *State v. Atchley*, 142 Wn. App. 147, 154, 173 P.3d 323 (2007) (citing *Robel v. Roundup Corp.*, 148 Wash.2d 35, 43, 59 P.3d 611 (2002)).

Off. Ponton stated in the affidavit for the warrant and testified that Mr. Cox said there was *possibly* a firearm in the vehicle under the front seat if he had it. CP 25; RP 13, 22–23, 25–26, 30, 36. There was absolutely no evidence presented showing this to be a false statement.

Thus, the findings that Off. Ponton stated, in unqualified terms, that Mr. Cox admitted there was a firearm in his vehicle and that, by Off. Ponton's own admission, this statement was false are not supported by substantial evidence.

Further, Off. Ponton's reports (CP 25, 35–36) demonstrate that his affidavit and testimony was consistent with his knowledge of what had transpired. The court cites to *State v. Stephens*, 37 Wn. App. 76, 676 P.2d 832 (1984) and concludes that Off. Ponton's statement was made in reckless disregard for the truth. However, the *Stephens* Court pointed out that a statement may be a summation without constituting a statement made in reckless disregard for the truth, although such statement may still be conclusory and insufficient to allow a finding of probable cause. *See Stephens*, 37 Wn. App. at 79–80.

Here, Off. Ponton's statement in the affidavit was consistent with his reports and his testimony. It is true that Off. Ponton left out information that would have helped make a stronger case for a finding of probable cause. For instance, Off. Ponton could have told the magistrate that another source of his

information was Kep Kepler the manager of Sarge's Place where Mr. Cox resided. CP 35, RP 18–19. Off. Ponton could have stated that Mr. Kepler informed that he believed Mr. Cox had a gun and it was in the trunk of Mr. Cox's car and that Mr. Kepler and other residents were sitting on the trunk of the vehicle in anticipation of Mr. Cox arriving home in order to prevent Mr. Cox from retrieving the gun. CP 35, RP 18–19.

However, Off. Ponton's statements in the affidavit and the information known to him were consistent. There was no reckless disregard for the truth.

Therefore, the conclusion that Off. Ponton stated to the magistrate that Mr. Cox admitted he has a gun in the vehicle in reckless disregard for the truth is erroneous and should be reversed.

C. THE TRIAL COURT ABUSED ITS DISCRETION BY CONCLUDING THAT THERE WAS NO PROBABLE CAUSE FOR THE SEARCH WARRANT BECAUSE THE CONCLUSION WAS BASED UPON FINDINGS WHICH WERE NOT SUPPORTED BY THE RECORD.

Trial court rulings relating to the admission of evidence are reviewed for abuse of discretion. *State v. Thomas*, 150 Wash.2d 821, 856, 83 P.3d 970 (2004). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

State v. Ruiz, 176 Wn. App. 623, 634, 309 P.3d 700 (2013).

Three steps are included in this analysis: first, the court has acted on untenable grounds if its factual findings are unsupported by the record; second, the court has acted for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard; third, the court has acted unreasonably if its decision

is outside the range of acceptable choices given the facts and the legal standard.

State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citation omitted).

As argued above, there was no offending statement because Officer Ponton made it clear that the defendant said there *might* be a firearm in his vehicle, not that there was a firearm in positive or definitive terms. Furthermore, Judge Wood asked for clarification if Mr. Cox said there was a possible firearm in the vehicle and Off. Ponton affirmed this and said Mr. Cox said it would be under the front seat if it was there.

Therefore, there is no basis to find that Off. Ponton told the magistrate that Mr. Cox admitted there was a gun in his vehicle in unqualified terms and that Off. Ponton made such a statement with reckless disregard for the truth. Furthermore, the affidavit shows that the magistrate issued the with the understanding the Mr. Cox admitted there was *possibly* a firearm in his vehicle.

Ultimately, the trial court's findings and conclusions were not supported by the record and, therefore, there was no statement to excise from the affidavit to determine if there was still probable cause. *See State v. Stephens*, 37 Wn. App. 76, 79, 678 P.2d 832 (1984) ("The remedy for such a misstatement as mandated by *Franks* and *State v. Sweet*, 23 Wash.App. 97,

596 P.2d 1080 (1979), is to excise the offending language and if the remaining information does not show probable cause, the evidence seized must be suppressed.”).

To establish probable cause, the affidavit for a search warrant “must set forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity.” *Cord*, 103 Wash.2d at 365–66, 693 P.2d 81. Probable cause requires only a probability of criminal activity, not a prima facie showing. *State v. Maddox*, 152 Wash.2d 499, 505, 98 P.3d 1199 (2004). In determining probable cause, the magistrate makes a practical, commonsense decision, and is entitled to draw reasonable inferences from all the facts and circumstances set forth in the affidavit. *Id.*

State v. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007).

A magistrate's determination of probable cause is reviewed for abuse of discretion, and the determination is accorded great deference by the reviewing court. *Cole*, 128 Wn.2d at 286, 906 P.2d 925. Doubts are to be resolved in favor of the warrant's validity. *State v. Kalakosky*, 121 Wash.2d 525, 531, 852 P.2d 1064 (1993).

Id. at 161.

Off. Ponton stated that he had information that Mr. Cox was suicidal and that he had just left the hospital and was heading back to his apartment on foot. Off. Ponton was able to corroborate some of this as he encountered Mr. Cox on his way to his home on foot and Mr. Cox was very agitated. Mr. Cox was so agitated that Off. Ponton was not able to communicate with him to make sure Mr. Cox was alright. Then Mr. Cox appeared to reach for his knife after Off. Ponton warned him not to. RP 35. After Mr. Cox was taken to the hospital, he eventually admitted to Off. Ponton that there was possibly

a firearm in his vehicle and that it would be under the seat if he had it. The defendant also mentioned a 9 mm magazine in his vehicle. This statement together with the statement that there was possibly a firearm in the vehicle with the specific location in the vehicle where it would be if it was there creates a probability of the existence of the firearm in the vehicle.

A reasonable inference could be made that there was a probability that the gun would be under the seat where the defendant seemed to remember it being and said it might still be. Furthermore, it was demonstrated in the affidavit that the defendant had a prior felony conviction and was therefore prohibited from possessing a firearm.

Although the affidavit did not demonstrate in the clearest terms and beyond a reasonable doubt that there would be a firearm in the vehicle under the seat, there was enough information available such that any doubt should be resolved in favor of the finding of probable cause. "Doubts are to be resolved in favor of the warrant's validity." *Atchley*, 142 Wn. App. at 161, 173 P.3d 323 (2007) (citing *State v. Kalakosky*, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993)).

Therefore, the affidavit supported a finding of probable cause and the trial court's ruling suppressing the evidence should be reversed.

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VI. CONCLUSION

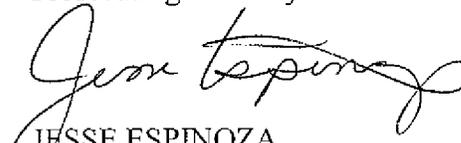
The trial court's conclusion that Off. Ponton told the magistrate, with reckless disregard for the truth, that Mr. Cox stated in definitive terms that there was a gun in his vehicle was not supported by the record. Therefore, the trial court abused its discretion in suppressing the evidence.

For the foregoing reasons, the trial court's conclusion that Off. Ponton made a false statement in the affidavit with reckless disregard for the truth, and the order suppressing the evidence should be reversed.

Respectfully submitted this 4th day of February, 2016.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney

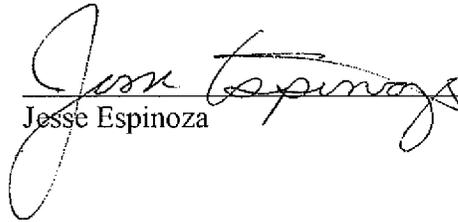


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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Thomas E. Weaver, JR on Feb. 4, 2016.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

CLALLAM COUNTY PROSECUTOR

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